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LEGAL UPDATES FOR BUSINESSES

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Welcome to the September 2018 issue of the Schenck, Price *Legal Updates for Businesses*. With a complex and rapidly changing legal environment related to businesses, our goal is to help you identify and consider some of the many issues that present themselves to the owners and managers of businesses every day. In this edition we have articles related to employment compensation and benefits, contracts, local redevelopment, branding your company, and preparing your company for a sale. The members of our Corporate Practice Group at Schenck, Price are very experienced and knowledgeable in each of our areas of focus, and all of us are very committed to assisting you as you work to grow and make your companies prosper.

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How to Choose a Brand Name

By Jamie Taub, Esq.

We often receive inquiries from clients seeking to develop and protect a new brand name as a trademark. This article was written to proactively explain to you, our reader, the most distinctive (and thereby protectable) types of trademarks in order to help you choose the brand name that best meets your needs.

By way of background, a trademark is a word, name, symbol, or device or any combination thereof, used or intended to be used to identify and distinguish your company's goods or services from those goods or services sold by others, and to indicate your company as the source of those goods or services. In other words, a trademark is a brand name for your company or your company's products or services. Over time, it can become one of your most valuable assets.

When choosing a trademark, you ideally want to include a term or terms that will sufficiently distinguish your goods or services from those offered by competitors. Trademarks fall within four categories: (1) fanciful; (2) arbitrary; (3) suggestive; or (4) descriptive. Marks that fall within the first three of these categories (fanciful, arbitrary and suggestive) are "inherently distinctive" and automatically entitled to the highest level of protection under U.S. Lanham Act (the federal trademark statute) and state trademark and unfair competition statutes. Conversely, descriptive marks are not usually entitled to significant protection under the law, unless you have been able to build up the brand over time.

Here are descriptions and examples of the four categories of trademarks:

Fanciful or coined mark—This is a mark that is comprised of an invented term and has no meaning at all outside of its use as a trademark for a particular product or service.

Examples of fanciful marks are GrubHub® online food ordering service and Prilosec® heartburn medicine.

Arbitrary mark—This is a mark that is comprised of an actual defined term that is arbitrarily used to label your goods or services. Examples include Apple® computers, Adobe® software, and Dawn® dish soap. The term "apple" has no connection with computers, so Apple® was able to build a distinctive brand by using the term in an arbitrary sense.

Suggestive mark—This is a mark that is comprised of a term (sometimes coined) that indirectly describes a product or service and requires a certain level of imagination or mental leap to associate the term with the product or service. Examples include Microsoft® computer software, Coppertone® suntan lotion and Kitchenaid® kitchen appliances.

Descriptive mark—This is a mark that is comprised of a term (or terms) that describes a product or service that it covers. Descriptive marks are usually not entitled to a high level of trademark protection because no one party should be able to prevent another party from using a descriptive term in connection with the sale of their products. For instance, while the term "fuji" is arbitrary in connection with the sale of cameras and film, it is descriptive in connection with the sale of apples (i.e., fuji apples). And simply because one apple orchard uses the trademark "Fuji Stand," this does not mean that it can then prevent any other apple orchard from using the term "fuji" in the promotion of its own fuji apples that it has for sale.

Based on the above, we generally recommend including a term(s) that is fanciful, arbitrary or suggestive when formulating a trademark. Your brand will automatically be distinctive from others, so long as there are no previously existing senior users of the mark or any confusingly similar variation thereof.

That having been said, many business owners choose descriptive trademarks, at least in part. For example, a local retail store might decide to include the name of their town as part of their company name to allow customers to know where they are located. They also might include the name of the type of store, such as "food market," in their name to allow customers to know what goods they sell. Although this is not the most ideal method for establishing a distinctive nationwide brand, this can be helpful for local commerce purposes. Additionally, even where a trademark is wholly descriptive, it might still be able to acquire distinctiveness or "secondary meaning" following several years of exclusive, continuous use and significant marketing efforts, after which the purchasing public recognizes the mark as identifying one source or company. A prime example of this is The Container Store,® which sells containers, and therefore, by all accounts is descriptive. And yet, this mark was granted the highest level of federal trademark registration because of the significant consumer recognition it has garnered based on the extensive marketing of the mark since 1978. Nevertheless, if you develop a mark that includes a fanciful, arbitrary or suggestive term, this will generally give you a step up in the process.

Please keep in mind that choosing your mark is only the first step in the process of developing your intellectual property portfolio. Once your mark is initially selected, you should: (i) have a trademark search performed (prior to using the mark) to make sure that no third party is already using your mark or a confusingly similar variation; (ii) determine whether federal and/or international trademark registration makes sense for your business; (iii) establish a marketing plan to build your brand; and (iv) take steps to enforce your trademark rights against unauthorized junior third party users of the trademark. Following these steps will help you increase the overall value of your intellectual property portfolio and your business.

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Achieving Compliance With New Jersey's Equal Pay Act

By Joseph Maddaloni, Jr., Esq.

Earlier this year, Governor Murphy signed the Diane B. Allen Equal Pay Act ("Equal Pay Act"), which became effective on July 1, 2018. The Equal Pay Act is touted as the strongest equal pay law in the country. While the Equal Pay Act had its genesis in protecting equal pay between the sexes, the final version of the law expanded its protections to all protected classes including race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces.

The law prohibits all employers from paying any member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class, and who perform substantially similar work, when viewed as a composite of skill, effort and responsibility. An employer can pay protected employees differently if the employer demonstrates that the difference in pay is made pursuant to a bona fide seniority system or a merit system, or if the employer can show that the disparity otherwise meets the Equal Pay Act's strict requirements.

There is no grandfathering clause in the Equal Pay Act, which means that compensation and benefits plans must be evaluated to correct existing pay disparities as well as to assure future compliance. Following these ten steps will aid employers in their efforts to achieve compliance with the Equal Pay Act's requirements:

1. **Implement a bona fide seniority or merit system:**
    - **a. Seniority System:**
        - i. Allocate benefits and compensation according to length of service.
    - **b. Merit System:**
        - i. Must be a structured procedure;
        - ii. Employees must be evaluated at regular intervals using pre-determined criteria;
        - iii. Can be based upon objective standards such as a test or a subjective standard (subjective standard will be strictly scrutinized for compliance).

Or:

2. **Audit job titles and job descriptions:**
    - a. Review job titles and job descriptions across all operations & facilities;
    - b. Identify jobs with "common core" tasks;
    - c. What are the specific duties and requirements of each job? What skills, effort and responsibility are required?
    - d. Group together jobs that are "substantially similar"?

3. **Compare substantially similar jobs for compensation differences:**
    - a. Are the employees in substantially similar jobs paid differently?
    - b. Include other benefits such as health care, bonuses and pension contributions as part of compensation for each job.

4. **Evaluate whether pay differences are justified under the law:**
    - a. Can the pay differences be justified based upon one or more bona fide legitimate factors such as training, education, experience or quantity & quality of production?
    - b. Is each factor applied reasonably?
    - c. Do one or more factors account for the entire differential?
    - d. Is each factor job-related?

5. **Evaluate whether there are alternative business practices that would serve the same objective without causing the pay differential.**

6. **Adjust pay differentials that cannot be justified under the law:**
    - a. Do not reduce the rate of pay of any employee to comply with the law.
    - b. Compliance can only be achieved by increasing the rate of pay.

7. **Revise existing employee handbooks and policies:**
    - a. Prohibit pay discrimination for substantially similar jobs;
    - b. Prohibit retaliation against employees who request, discuss or disclose compensation or other job-related information covered by the law.

8. **Evaluate hiring, recruitment and promotion procedures:**
    - a. Ensure equal employment and advancement opportunities;

b. Do not investigate or ask job applicants about compensation history;

c. Compensate jobs based upon the duties and responsibilities performed and on who fills the position.

9. **Train HR professionals, managers and other key employees responsible for compensation and benefits to be familiar with the law's requirements.**

10. **Work closely with your outside professionals to maximize your compliance efforts and reduce potential liability.**

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Why You Should Clean House Before You Sell Your Business

By Ilana T. Pearl, Esq.

You've spent years building your company, but now you are thinking of moving on. Whether you are leaving for retirement or to devote your time to a new venture, don't wait until after you have an offer on the table from a potential buyer to take stock of your company and clean up your books and records. If you do that, you will most likely leave money on the table. To get top dollar for your business, you should start preparing your company for sale as early as possible, but in no event later than one year in advance of the actual sale, if possible.

Most of the work you will be doing in that year is of a business nature, such as shoring up contracts with key customers and suppliers, ensuring the retention of necessary employees, and cleaning up the financial statements. But in addition to addressing these business issues, you will need to devote significant time and energy to pulling together and familiarizing yourself with all of the documents and instruments you will need to turn over to potential buyers.

One of the first things that any seller will be asked to do once a letter of intent has been signed is produce all of the paperwork that establishes (i) the company's formation, ownership and status in the state of its organization; (ii) the salaries and titles of each of the company's employees, and the compensation and benefit obligations owed by the company to its employees; (iii) material contracts; (iv) key customers and suppliers; (v) the company's permits and licenses; (vi) the company's right, title and interest in and to each of its assets; (vii) any environmental issues your company faces, if applicable; and (viii) any other issues that the buyer believes to be material to the operation of your business. This process is called "due diligence". Unless you are selling your business to an employee or family member who is already familiar with the operation of the business, comprehensive due diligence will be required before any buyer will agree to consummate the purchase, and the price for the business fixed in the letter of intent between the seller and buyer will likely be contingent on the satisfactory completion by the buyer of due diligence.

If you wait until you have already signed a letter of intent to focus on due diligence, you may not get the best price for your business. Even worse, if your books and records are particularly messy, you might scare away potential buyers and find yourself unable to sell your company at all. This article outlines three key reasons why it is imperative that you clean house and prepare for due diligence as early as possible.

You Need to Fill in Gaps and Fix Problems Before the Buyer Gets Involved

Maybe you were so busy running your business that you forgot to pay your landlord in June or you forgot to renew a business permit before it expired. Or maybe your accountant was so busy at tax time that he neglected to file the company's annual report with the state, as a result of which your company is no longer in good standing. Or maybe you and your partners got along so well that you never saw the need for corporate bylaws, meetings or the keeping of meeting minutes. Things happen. It might not seem like a big deal to you as long as customers keep buying and the company remains profitable, but think of how these mistakes look to a cautious buyer. Buyers hate surprises. Nothing will spook a buyer faster than discovering unexpected liens or defaults or learning that a required permit or filing is not up-to-date.

Buyers also hate sloppiness. No buyer wants to learn in the due diligence process that a company's owners, accountants, and/or management team have been haphazard or neglectful with their internal controls. In such cases, the buyer perceives more risk and may worry about the health of the company or the accuracy of the earnings projections presented by the buyer. Once you lose a buyer's confidence and trust, it can be difficult to recover, and you may end up leaving money on the table or losing your buyer altogether. As a seller, you can minimize this risk by carefully preparing your documents in advance.

You Need to Understand Your Company's Weaknesses Before Talking to Buyers

Every company has weaknesses, such as high employee turnover, a pending lawsuit, or loss of a key customer. Buyers will be quick to spot these weaknesses when conducting due diligence and may use them to renegotiate the purchase price downward or, even worse, may walk away altogether. Therefore, as a seller, you need to be prepared to discuss these weaknesses with potential buyers and present them — to the extent possible without making any misrepresentations — in a manner that is favorable to your company and allays the buyer's fears. You will not be able to paint your weaknesses in the most favorable light unless you know what the company's weaknesses are and why they exist.

The emotional attachment you have to your business, or the manner in which you have delegated the operation of the business to a manager or other executive, may make it hard for you to see the company's weaknesses on a day-to-day basis. Pulling together your company's paperwork early and reviewing it with an eye towards selling the business will help give you the perspective you need to identify the company's vulnerabilities and figure out what to do about them before you sell. In some cases, you may decide to delay the sale of the business until one of your key weaknesses is resolved, such as waiting until a pending lawsuit is settled or an unwilling minority shareholder has been bought out. In other cases, where you cannot fix the problem prior to sale, the added time and perspective will allow you to control the narrative, giving you the opportunity to craft an explanation for the weakness that does not undermine the buyer's confidence in the company or decrease the value of the company in the buyer's eyes.

Delays Destroy Deals

A large percentage of the small and middle-market businesses that are put up for sale fail to proceed to a closing, and those that do sell often sell for far less than the seller anticipated when first contemplating a sale. While deals fail for all kinds of reasons, including unrealistic price expectations and changes in market conditions, one of the main reasons that business deals die is that the buyer got frustrated with the amount of time it took for the seller to produce key documents in due diligence.

Every deal has a timeline. When a deal drags on longer than expected because the seller produced an incomplete set of documents, or could not find key documents that the buyer requested in the due diligence process, the buyer may get frustrated with the seller and lose interest, or the buyer may lose the financing it lined up for the purchase since it failed to close the deal by a certain deadline. Even if the seller does not walk away from the deal, you might find that delays and incomplete diligence result in a purchase price much lower than you originally negotiated with your buyer. As a seller, you can prevent these delays by making sure you are prepared for due diligence before entering negotiations and signing the letter of intent.

In short, if you want the best price for your business, you should not wait until you have signed a letter of intent with a potential buyer before preparing due diligence. Doing that work in advance, while it may seem onerous and time consuming, will help you understand your business before entering negotiations and give your time to fix any problems you discover before shopping the company around, which will help you maximize the value of the company at the time of sale.

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The "No Oral Modification Clause" and the Reality of Modern Communications

By Michael J. Marotte, Esq.

Contracts are often drafted with "no oral modification" ("NOM") clauses. The clauses purport to confirm the parties' intent to treat the contract as 'final' and not subject to modification or amendment except via a formal process and subsequent written agreement. The NOM clause, together with the "integration clause,"[1] are intended to express the parties' understanding that the contract is final and enforceable as to its subject matter and that absent some formal process, it is subject to amendment or modification. Below is a sample NOM clause.

Amendment and Waiver. *This Agreement may be amended, or any portion of this Agreement may be waived, provided that such amendment shall be in writing and executed by the Parties and such waiver shall be in writing and executed by each Party against whom such waiver is enforceable, and all such amendments and waivers made shall be binding upon the Parties. No course of dealing between or among any persons having any interest in this Agreement shall be deemed effective to modify, amend or discharge any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement. The delay or failure by either Party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that Party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.*

After the execution of the contract containing the above NOM clause, the parties through a series of emails materially varied the terms of the contract, to one party's surprise and substantial detriment.

Subsequent, post-execution oral or electronic communications can suffice to amend or modify an agreement or contract under certain circumstances. E-mails and e-mail signature blocks may be treated as "signed writings" in conformity with the NOM provisions. This is especially true if the subsequent communications explicitly confirm the parties' intent to amend or modify the agreement or contract notwithstanding the NOM provision. In addition, if the parties act in conformity with the subsequent communications, the amendment or modification will be deemed ratified notwithstanding the NOM clause.

In April 2008, the Supreme Court of New York, Appellate Division, Stevens v. Publicis, S.A, and held that a subsequent email can modify a written contract containing a 'no amendment' provision. The Court held that,

> *The e-mails from plaintiff constitute "signed writings" within the meaning of the statute of frauds, since plaintiff's name at the end of his e-mail signified his intent to authenticate the contents (see Rosenfeld v Zerneck, 4 Misc 3d 193 [2004]). Similarly, Bloom's name at the end of his e-mail constituted a "signed writing" and satisfied the requirement of § 13(d) of the employment agreement that any modification be signed by all parties.*

Under federal law (the Federal Electronic Signatures in Global and National Commerce Act (E-SIGN)) electronic or pdf signatures and traditional 'wet ink' signatures are equally enforceable. Many states have also adopted the Uniform Electronic Transactions Act (UETA) which is similar in intent. Under the UETA, parties must agree to contract electronically or via PDF. However, when the parties are silent on the issue, such an agreement can be implied by the use of electronic communications to conduct the transaction. A few states (New York, Tennessee and Montana) have specific statutes governing NOM clauses.

Under common law, parties are free to form, supplement or modify contracts and agreements by e-mail or other electronic communications (including via instant messenger or similar electronic messages) or orally (subject to the statute of frauds)—even if there is a statutory or contractually imposed writing requirement—so long as all the requisite elements of contract formation are present in the e-mail, electronic or oral exchange.

With the proliferation of email communications, it is very easy for parties to inadvertently modify a contract or agreement via subsequent electronic or oral communication. In order to avoid this potential pitfall, the parties may wish to incorporate a NEM ("no electronic modification") clause with the NOM clause.

However, even with the NEM clause, the parties will remain free to enter into a new contract or agreement provided the requisite formalities concomitant with contract formation are present. Properly drafted, the NOM and NEM clauses should prevent the inadvertent formation of a new or modified contract to one party's detriment.

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[1] *Integration clauses confirm that the written agreement is intended to supersede any prior written or oral agreements concerning the subject of the written agreement.*

What is the Local Redevelopment and Housing Law?

By Matthew P. Posada, Esq.

The Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., (the "LRHL") is a legal mechanism designed to ensure the successful redevelopment of blighted areas within the State of New Jersey. The LRHL derives its Constitutional basis from the New Jersey Constitution, Art. 8 § 3, paragraph 1, which authorizes the "clearance, re-planning, development or redevelopment of blighted areas…" In connection with the redevelopment of land, the New Jersey Constitution permits municipalities to exercise the powers of eminent domain and to exempt from taxation, for a limited period, those improvements which are constructed in furtherance of the municipality's redevelopment efforts. Essentially, the LRHL is an exercise of the zoning powers of the municipality, which are designed to encourage development in degenerated areas.

A municipality's governing body and planning board work in conjunction in exercising the redevelopment and rehabilitation functions. The first step in the process of redeveloping a delineated area is by resolution from the governing body authorizing a preliminary investigation of said area. The preliminary investigation report will assist the planning board and governing body in determining if the delineated area is an area in need of redevelopment or rehabilitation pursuant to the statutory criteria. If a delineated area is designated an area in need of redevelopment or rehabilitation, a redevelopment plan must be adopted for same before the municipality may act.

The redevelopment plan will include an outline for the planning, development, redevelopment, or rehabilitation of the project area pursuant to mandatory components listed in the statute. The redevelopment plan will set forth the permitted land uses and building requirements (also known as bulk requirements) for the project area. Once the redevelopment plan is adopted by ordinance and enacted, the municipality can contract with a person or entity for the actual redevelopment or rehabilitation of the project area and begin negotiating a redevelopment agreement. Such contracts do not require Requests for Qualifications/Proposals as a municipality has the discretionary power to designate any particular person or entity as redeveloper of a designated redevelopment area. Accordingly, the redevelopment plan and redevelopment agreement operate in conjunction to allow a redeveloper to have their very own zoning contract.

The LRHL has been assisting developers and municipalities to revitalize neighborhoods throughout the State since 1992. If you are interested in taking advantage of these benefits, making a difference in a local community, and becoming a part of the redevelopment trend, please feel free to reach out to inquire and learn more.

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DOL Issues Final Rule on Single Employer Criteria for Association Health Plans

By Divya Srivastav-Seth, Esq.

The United States Department of Labor ("DOL") recently issued a final regulation that provides more flexible criteria for qualifying a health benefits plan offered by an association that is comprised of multiple employer members as a single employer sponsored health benefit plan. 29 CFR Part 2510 ("Rule").

On its face, the Rule's intent is to enable small employer group members and sole proprietors in a qualified association health plan ("AHP") to obtain large group coverage and avoid paying the higher costs that are a result of the Affordable Care Act's ("ACA") mandate that small employer group and individual health insurance products include specific essential health benefits coverage.

Pre-Rule Criteria: Commonality of Interest and Purpose Unrelated to Benefits

Historically, the DOL has only recognized an AHP as a single employer health plan if (i) it is a bona fide business with a purpose unrelated to the health benefits; (ii) has a commonality of interest between association members demonstrated by a close economic or representational interest unrelated to the provision of benefits and (iii) employer members have control over the plan in form and substance. If a group or association did not meet these standards, its associational status would be disregarded, and each employer member would be subject to its individual level of compliance under the ACA.

New Rule Criteria: Commonality of Interest and Purpose Can Be Related to Benefits

The new Rule lowers the standards for an association to qualify as a single employer by deeming a commonality of interest to exist if; (i) the members are involved in the same trade, industry, line of business or profession or (ii) are employers in the same state or metropolitan area which can even include tri-state areas such as New York, New Jersey and Connecticut. In further contrast to the DOL's earlier stance, the new Rule also permits the association's primary purpose to be the provision of health benefits as long as it also has an alternative substantial business purpose, but this does not need to be economic.

Dual Treatment of Self-Employed Owner of Valid Business

In addition, the Rule provides that each association employer member must have at least one employee but allows a self-employed working owner in a valid business enterprise to be treated as both an employer and employee. The Rule outlines criteria for determination of the validity of the business enterprise including a requirement that the sole proprietor work 20 hours per week or 80 hours a month.

Formal Organization and Control

In order to qualify as a single employer sponsored AHP, the association must be formally organized with a governing body and by-laws or other similar indications of formality. The association's employer members that participate in the AHP must control the plan functions in both form and substance.

Non-Discrimination

The Rule prohibits any discrimination based on health-related factors but the DOL declined to adopt any similar rating limitations for the risk generated by age, gender, occupation, and geography.

Compliance with ACA and ERISA

If the association qualifies as a single employer, the employees of its employer members would be aggregated to determine which ACA group requirements apply. Under the Rule, if the aggregate number is 50 or more, the AHP could offer large group coverage to its small employer and sole proprietor members. The qualified AHP would have to comply with ERISA and ACA requirements regarding employer health group coverage, but the small employer or individual would not be subject to the ACA's requirements for large employer groups e.g. maintenance of minimum value coverage and employer shared responsibility payments, by virtue of their association. In addition, the small employers or individual working owner's tax status would not change.

AHPs and MEWAs: State Law Controversy

AHPS are considered multiple employer welfare arrangement ("MEWAs"). New Jersey state law regulates MEWAs and requires MEWAs to provide small employer members with coverage in conformity with the comprehensive standard health benefits plans established under state law for small employers. Also, New Jersey has enacted a state mandate for individual coverage and requires community rating for these markets which supports the existence and affordability of these markets in the state.

The Rule is ambiguous about its effect on state laws governing MEWAs, especially those that are self-funded. ERISA preempts state law regarding self-funded plans but retains state authority with respect to regulation of insurance. Although the commentary to the Rule provides that the states have authority to regulate and implement any measures to ensure compliance with the state insurance reserves and funding obligations for fully insured MEWAs that are AHPs, it is less clear about self-funded plans and the DOL has reserved its authority to push back if a state regulates in contravention of the Rule. In addition, other New Jersey regulations vary from the Rule with respect to general association requirements.

These existing state laws conflict with the Rule's express intent to facilitate small employer group and sole proprietor entry into the large group marketplace through AHPs and form the core of a pending multi-state lawsuit that challenges the Rule and seeks its stay and reversal. Any New Jersey association considering taking advantage of the new flexibility offered under the Rule should carefully weigh the investment required against the likelihood of the lawsuit's success or the state's ability to implement additional regulations to safeguard its small employer and individual markets. The Rule is effective as of September 1, 2018 for fully insured AHPs, January 1, 2019 for self-funded AHPs formed prior to the Rule and April 1, 2019 for new self-funded AHPs.

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